

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Review of the Commission's) MM Docket No. 98-204
Broadcast and Cable)
Equal Employment Opportunity)
Rules and Policies)

To: The Commission

COMMENTS OF SMITHWICK & BELENDIUK, P.C.

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Smithwick & Belendiuk, P.C. ("S&B"), pro se, and pursuant to Section 1.415 of the Rules, 47 C.F.R. § 1.415, hereby comments on the Notice of Proposed Rule Making ("NPRM"), FCC 98-305, released November 20, 1998, undertaking inter alia a review of the Commission's broadcast equal employment opportunity rules and policies.^{1/} In support thereof, S&B respectfully states as follows:

I. Introduction

A. Statement of Interest.

1. Smithwick & Belendiuk, P.C., is a communications law firm, which represents over three hundred radio and television stations before the Commission and whose principals have had

^{1/} The comment date in this proceeding was last extended to March 1, 1999, by Order, FCC 99-326, released February 12, 1999.

ownership interests in numerous broadcast stations. The views expressed herein are those of the firm and are not necessarily those of its clients.

B. Summary of Argument.

2. Section 334 of the Communications Act of 1934, as amended, 47 U.S.C. § 334, expressly prohibits the Commission from revising its EEO regulations (47 C.F.R. 73.2080) as such regulations apply to television stations. Only the Congress, having expressly codified Section 73.2080, has the authority to change that regulation. The proposed changes to Section 73.2080(c) are not made only "to the extent necessary to make those rules constitutional under Lutheran Church" (NPRM, Par. 35). Rather, the Commission proposes a complete rewrite of its EEO Program Requirements to transform such regulations from admonitory guidelines to mandatory rules.

3. The Commission proposes to prescribe minority-specific recruitment requirements (NPRM, Par. 63) and detailed self-assessment measures (NPRM, Appendix A thereto). In these circumstances, it is probable that a reviewing Court will subject the final EEO regulations to strict scrutiny and, in consequence, it is incumbent upon the Commission to demonstrate, if it can, that program diversity is a compelling governmental interest.

4. The Commission must also narrowly tailor its EEO regulations to advance the Commission's interest in promoting program diversity. Low-level employees, e.g., technicians and office and clerical staff, should be excluded from the ambit of the proposed regulations as should small broadcast stations with a staff of fifteen or less fulltime employees. The Commission should also exempt from its proposed EEO Program Requirements stations located in markets with an aggregate labor force of 50,000 or less and an aggregate minority group representation in the labor force of ten percent or less. Finally, the Commission should exempt from its proposed EEO Program Requirements positions to be filled by owners of closely held broadcast licensees.

5. Because the Commission's EEO regulations are not likely to pass statutory or constitutional muster, S&B would urge the Commission to consider a constructive alternative to accomplish its objective of fostering diversity of viewpoints in programming. Specifically, S&B would urge the Commission to adopt an EEO Policy Statement, modeled after Section 73.2080(a)-(c) of the Rules, setting forth its views concerning how broadcast stations ought to ensure equal employment opportunities to all qualified persons.

6. S&B would also urge the Commission to embark upon a comprehensive outreach program to assist broadcasters in implementing the EEO policy described in the EEO Policy Statement. The program would encompass a National Job Bank maintained on the Commission's Internet web site, and FCC staff assistance to National, State and local industry, women and minority organizations in establishing job banks, job fairs and other recruitment activities. The Commission's EEO staff would also work with industry associations, group owners and individual broadcasters to develop on-the-job training opportunities and with school systems, colleges and broadcasters to develop student internships and scholarship programs. In S&B's view, such a comprehensive outreach program is likely to be more successful than the Commission's proposed mandatory regulations which will depend on continual regulatory oversight and the imposition of punitive sanctions.

7. Finally, S&B would urge the Commission to cede to the Equal Employment Opportunity Commission primary jurisdiction to process employment discrimination cases involving broadcasters, retaining of course in cases of final determination by the EEOC or by State or local bodies the authority to take appropriate action, e.g., license revocation, license renewal denial or short term renewal.

II. Background

A. 1987 Revision of the Broadcast EEO Rules.

8. The Commission last undertook a review and revision of its broadcast EEO rules in the mid-1980's. In Equal Employment Opportunity Rules for Broadcasters, 2 FCC Rcd 3967, 63 RR2d 220 (1987), the Commission revised its EEO rules and policies for broadcasters inter alia (1) to adopt a new EEO Program Report (FCC Form 396) to be filed as a part of all license renewal applications, and (2) to announce a two-step approach to be used by the Commission in evaluating broadcasters' EEO efforts at renewal time.

9. Under the first step, the Commission would examine a station's EEO program and policies as described in its Program Report, any EEO complaints filed against the station or the licensee, the composition of the station's workforce as reflected in its Annual Employment Reports (FCC Form 395-B), the composition of the available labor force in the station's home county or its Metropolitan Statistical Area ("MSA") and such other pertinent information as may be available concerning the station's EEO activities.

10. If this initial evaluation indicated that a station's efforts may have been less than satisfactory, the Commission would undertake a second step investigation of those areas of

responsibility where the station's efforts appeared to be deficient. In making these changes, the Commission pointedly observed that "our policy with respect to evaluation of broadcaster's EEO efforts should not be interpreted to allow the use of the [processing] guidelines as either quotas or as a 'safe harbor'" (63 RR 2d at 235).

11. The Commission also incorporated into Section 73.2080(c) of its rules certain "program requirements and general guidelines, in the form of examples of acceptable activities, for meeting [its EEO] requirements" that had previously appeared only in its Model EEO Program Report (63 RR2d at 226).

12. That is, in addition to Section 73.2080(b) ("EEO Program"), which required each broadcast station to "establish, maintain and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment and practice," Section 73.2080(c) ("EEO Program Requirements") stated that a broadcast station's EEO Program "should reasonably address itself to [specific enumerated areas] ... to the extent possible, and to the extent that they are appropriate in terms of the station's size, location, etc."

13. The Commission professed that as written, the Section 73.2080(c) Program Requirements were "intended to serve only as examples of the types of activities that would fulfill the EEO

requirements", that "each licensee must determine the most appropriate means of carrying out its EEO Program based on the characteristics of the station and its local service area" and that the Commission's "listing of suggestions for meeting the EEO requirements is not intended to be either exclusive or inclusive but simply to provide guidance" (63 RR 2d at 226).

B. Broadcast EEO Enforcement.

14. During the past decade, the Commission embarked upon a comprehensive enforcement of its EEO rules. The centerpiece for its enforcement was a comparison of the composition of the relevant (MSA or County) labor force with the composition of a station's workforce. The licenses of stations which met the processing guidelines for the employment of minorities and women fulltime were invariably routinely renewed. Stations whose performance fell below the processing guidelines were separated out for a rigorous evaluation, which often culminated in the imposition of reporting conditions, the assessment of monetary fines and on occasion the issuance of short term renewals or designation of the renewal applications for adjudicatory hearing.

15. The Commission further construed its EEO rules to require broadcast stations to make reasonable, good faith efforts to recruit minorities and women for every fulltime job vacancy which was not filled by an internal promotion. Fines were

regularly levied for non-compliance despite the fact that the rules did not expressly impose any such requirement. Kelly Communications, Inc., 12 FCC Rcd 17868 (1997).

16. The Commission also came to expect broadcast stations to periodically self-assess their EEO program and to address any difficulties encountered in the implementation thereof. Once again fines were levied for non-compliance despite the fact that Section 73.2080(c) was by its terms admonitory rather than mandatory and notwithstanding that the Commission had professed the EEO Program Requirements to be "examples" and "guidelines". Congaree Broadcasters, Inc., 5 FCC Rcd 189, 67 RR2d 521 (1990).

17. Finally, the Commission came to expect broadcast stations to retain records demonstrating their efforts to recruit minorities and women. Once again, fines were levied although the record retention requirement was nowhere spelled out in the EEO rules. Southern Virginia Broadcasting Corp., 5 FCC Rcd 438, 67 R2d 532 (1990).^{2/}

^{2/} It is a cardinal principle of administrative law that the invocation of penal sanctions imposes a grave responsibility upon an administrative agency, that the same strict rule of construction that is applied to statutes defining criminal conduct also applies where an agency undertakes to impose penal sanctions, and that an agency must adequately inform those who are subject to the regulation what conduct will be considered a violation warranting the imposition of a penalty. M. Craus & Bros. v. United States, 327 U.S. 705, 707-08 (1946). This rule of law applies to Commission forfeiture proceedings. In United States v. Rust Communications Group, Inc., 425 F.Supp. 1029, 40

C. Judicial Review of Broadcast EEO Rules.

18. In a case decided April 14, 1998, the United States Court of Appeals for the District of Columbia Circuit declared the Commission's EEO Program Requirements unconstitutional. Lutheran Church - Missouri Synod v. FCC, 141, F.3d 344, 11 CR 1186 (D.C. Cir. 1998) ("Lutheran Church") Rehearing Denied, September 15, 1998. After adjudicatory hearing, the Commission determined inter alia that the Church had violated the EEO

RR2d 621 (E.D. Va. 1976), the United States District Court for the Eastern District of Virginia declared invalid the imposition of a forfeiture for the alleged violation of former Section 73.52(a) of the Rules. There, the court concluded that the regulation in question, when applied penally, was not written with the required specificity. In the absence of such specificity, it is unlawful for the Commission to assess a forfeiture penalty. Colonial Cablevision of Revere, Inc., 76 FCC2d 56, 46 RR2d 1399, 1402 (1980) ("We believe that [a sanction of forfeiture] can only be imposed when an actual violation of the Commission's rules or the Communications Act has been committed."). The requirement of adequate notice for the imposition of penal sanctions is firmly grounded in Constitutional concepts of due process. Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278 (1961). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. State of New Jersey, 306 U.S. 451, 453 (1939). "It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 243 (1932). In sum, "statutes and regulations which allow monetary penalties against those who violate them ... must give ... fair warning of the conduct it prohibits or requires" Diamond Roofing v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649 (5th Cir. 1976).

regulations by making insufficient efforts to recruit minorities at Stations KFUE(AM)-FM, Clayton, Missouri, imposed certain reporting requirements and levied a \$25,000 forfeiture for alleged misrepresentation. The Lutheran Church/Missouri Synod, 12 FCC Rcd 2152 (1997).

19. On appeal, the Church asserted that Section 73.2080(c) -- "the affirmative action portion of the Commission's EEO regulations is a race-based employment program in violation of the equal protection component of the Fifth Amendment" (11 CR at 1190). The Court agreed declaring Section 73.2080(c) unconstitutional because it "oblige[d] stations to grant some degree of preference to minorities in hiring." That is, the "entire scheme is built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation" (Ibid.).

20. The Court also concluded that Section 73.2080(c) was not narrowly tailored to serve a compelling state interest. The Court observed that the "Commission has unequivocally stated that its EEO regulations rest solely on its desire to foster 'diverse' programming content" (11 CR at 1194). The Court pointed out, however, that the "Commission never defines exactly what it means by 'diverse programming'" (Ibid.). The Court did "not think diversity can be elevated to the 'compelling' level ... "

(Ibid.), and it concluded that Section 73.2080(c) was "quite obviously not narrowly tailored" because it included within its ambit "low-level" employees who could not be said to influence programming content. (11 CR at 1196).

D. The Commission's Rule Making Proposal.

21. The Commission has invited comment on the following proposed changes in its EEO Program Requirements:

●**Labor Force Data.** As noted, the Court declared unconstitutional the Commission's practice of comparing the composition of the relevant (MSA or county) labor force with the composition of a station's workforce. The Commission proposes to remove this evaluation technique from its EEO Program Requirements and to discontinue using such evaluations in the administration of its EEO rules and policies.

●**Fulltime Hires.** The Commission has expressly incorporated into the proposed EEO rules the requirement that broadcast stations recruit minorities and women for every fulltime job vacancy which is not filled by an internal promotion.

●**Self-Assessment.** Broadcast stations must periodically self-assess their EEO program and address any difficulties encountered in the implementation thereof.

●**Record Retention.** The Commission also spells out in some detail that broadcast stations retain records demonstrating their efforts to recruit minorities and women and to self-assess such efforts.

●**Random Audits.** The Commission proposes to conduct random audits, including on-site audits, throughout the license term to enforce the EEO rules.

●**Religious Broadcasters.** The Commission had recently authorized religious broadcasters to establish religious belief or affiliation as a bona fide occupational qualification for all station employees. The Commission proposes to codify this ruling in its revised rules.

●**Small Market Stations.** Broadcast stations with fewer than five fulltime employees were not required to maintain a formal EEO Program under the Commission's prior EEO policy. The Commission has invited comment on whether such exemption should be extended to stations with fewer than ten fulltime employees.

●**Sanctions.** The Commission proposes to impose appropriate sanctions on stations that violate the recruiting and record keeping requirements of the EEO rules and which fail to file self-assessment statements with the Commission.

III. S&B's Comments on the Proposed Rules

A. The Proposed Changes in the EEO Broadcast Rules Are Interdicted by Statute.

22. As the Commission noted in its NPRM (Par. 26), Section 334 of the Communications Act of 1934, as amended, 47 U.S.C. §334 provides inter alia as follows:

The Commission shall not revise: (1) the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply

to television broadcast station licensees and permittees

23. The Commission acknowledges that according to the Conference Report, Section 334 "codifies the Commission's equal employment opportunity rules, 47 C.F.R. 73.2080" for television licensees and permittees (NPRM, Par. 27). The Commission also notes "that Section 334 prohibits the Commission from revising its EEO regulations ...", but expresses the belief "that this provision does not prevent us from establishing new EEO outreach program provisions ... to the extent necessary to make those rules constitutional under Lutheran Church." The Commission goes on to say that a "contrary interpretation of the statute would frustrate the clear congressional intent that television licensees be subject to EEO requirements, since it would prevent us from establishing new EEO regulations for television stations that address the concerns raised by the court in Lutheran Church" (NPRM, Par. 35).

24. With all due respect to the Commission, Section 334 of the Act plainly and unambiguously states in words of one syllable that the Commission shall not revise its EEO rules. MCI Telecommunications Corp. v Federal Communications Commn, 765 F.2d 1186, 1191, 58 RR2d 871, 876 (D.C. Cir. 1985) quoting the Supreme Court in Escoe v. Zerbst, 295 U.S. 490, 493 (1935) -- "Shall is

the language of command." It may be that the Congress would regret having enacted such a prohibition in light of the Court's decision in Lutheran Church. Nonetheless, and again with all due respect, only the Congress, having expressly codified Section 73.2080, has the authority to make changes in that regulation.

25. S&B would observe too that contrary to the Commission's statement, it does not propose to establish new EEO outreach program provisions "to the extent necessary to make those rules constitutional under Lutheran Church" (emphasis supplied) (NPRM, Par. 35). That is to say, the Commission does not propose simply to delete Section 73.2080(c)(3), which called on a broadcast licensee to "evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area [for example by comparing] the composition of the relevant labor area with composition of the station's workforce."

26. Rather, the Commission proposes to completely rewrite its EEO Program Requirements to transform them from admonitory guidelines to mandatory rules, the violation of which would support inter alia the imposition of monetary sanctions. Thus, the proposed rules would codify the Commission requirement, established by case law, that each broadcast station shall recruit for every fulltime broadcast vacancy in its operation

except for jobs filled by internal promotion.

27. The proposed rules also require stations to conduct a detailed self-assessment analysis and to submit a statement detailing its analysis for the twelve month period prior to license expiration. Finally, the proposed rules require each broadcast station to retain records to "prove" that it has satisfied the foregoing recruitment and self-assessment requirements (NPRM, Appendix A thereto). These proposed changes have nothing whatever to do with rendering the EEO Program Requirements constitutional, but rather would completely rewrite this regulation in express violation of Section 334 of the Act.

B. The Public Interest Mandate to Promote Programming Diversity Is Not a Compelling Governmental Interest.

28. In Lutheran Church, the Court held that the Commission's EEO Program Requirements were subject to "strict scrutiny" under the equal protection clause of the Fifth Amendment to the Constitution. After an exhaustive analysis, the Court concluded that the Commission's policy goal of promoting programming diversity is not a compelling governmental interest and is, therefore, insufficient to support Section 73.2080(c) of the rules (11 CR at 1195).

29. Remarkably, in its NPRM, the Commission does not appear to challenge this conclusion. Rather, the Commission argues that it has ample statutory authority to establish and administer its EEO rules, pointing out inter alia that the "Supreme Court has recognized that the FCC has statutory authority to regulate the employment practices of its licensees as a way of fostering diversity of viewpoints in programming" (NPRM, Par. 42). But the Commission does not reach the tentative conclusion that program diversity is a compelling (as distinguished from an important) governmental interest. Nor does it appear to request comment on this crucial issue.

30. It may be that the Commission believes that the elimination of a comparison of a station's workforce with its service area's labor force is sufficient to remove its proposed regulations from strict scrutiny. It is not altogether clear, however, that the Lutheran Church Court would agree. Thus, the Court pointed out that Section 73.2080(c) "affect[s] all kinds of employment decisions", noting for example, "when deciding how to fill job vacancies, the regulations require a station to choose minority-specific referral sources" (11 CR at 1192).

31. While the proposed rule does not require a broadcast station to choose minority-specific referral sources, the Commission indicates "that the recruitment requirement will be

set forth in greater detail at the Report and Order stage of this proceeding [after it considers] comment from all interested parties before settling on precisely what should be required" (NPRM, Par. 63). The Commission goes on to suggest that it could require "a specified number (e.g., three) [of] minority and female specific sources" (NPRM, Par. 65).

32. The Court also pointed out that under Section 73.2080(c) "an employer must conduct a formal analysis of its success in recruiting women and minorities and make decisions about its selection techniques and tests accordingly" (11 C.R. at 1192). As noted, the Commission's proposed rules (Section 73.2080(c)(2)) spell out detailed self-assessment measures. Even assuming that such requirements have no real or immediate effect on employment, the Court expressed the view that "the Equal Protection Clause would not seem to admit a de minimis exception" (Ibid.)

33. In sum, it is probable that a reviewing court would subject EEO regulations, such as those proposed by the Commission, to strict scrutiny and, in consequence, it is incumbent upon the Commission to demonstrate, if it can, that program diversity is a compelling governmental interest.

C. The Proposed EEO Regulations Are Not Narrowly Tailored to Advance the Commission's Interest in Promoting Program Diversity.

34. In 1994, the Commission acknowledged to Congress that a "legitimate concern" has been raised "that market and/or staff size prevents stations from attracting and retaining minority employees", that, in consequence, "we may consider such factors as population and staff size as well as the percentage of minorities in the labor force, as appropriate areas to examine more fully in the future," and that in particular, "we will want to explain how such changes can bring needed relief consistent with a viable EEO program." Equal Employment Opportunity Rules (Report to Congress), 9 FCC Rcd 6276, 76 RR2d 281, 296 (1994). Consistent with these stated intentions, the Commission should undertake to narrowly tailor its rules to advance its interest in promoting program diversity.

35. **Low Level Employees.** In Lutheran Church, the Court concluded that the Commission's Program Requirements regulation was not narrowly tailored to advance the Commission's interest in promoting program diversity. It pointed out that the Commission did not "introduce a single piece of evidence in this case linking low-level employees to programming content" and expressed the view that the "regulations could not pass the substantial

relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny" (11 CR at 1195-96).

36. In its NPRM (Par. 44), while seeking comment on this issue, the Commission expresses the "belief that program content is not determined solely by the individuals at the station with authority to select programming, but may also be influenced by interaction between these individuals and other station employees, which exposes the former to views and perspectives of the latter."

37. The Commission expresses the further belief "that low-level positions provide a way for individuals with no communications experience, including minorities and women, to enter the broadcast [industry] which, in turn, could lead to higher-level positions of greater responsibility that could affect program decisionmaking and/or provide the experience desired by financial institutions in prospective loan applicants for ownership of entities in the broadcast [industry]" (*Ibid.*).

38. In S&B's experience, persons employed in the Form 395-B Job Categories of "Technicians" and "Office and Clerical" do not in ordinary course influence program content. Certainly, that was the Commission's position when choosing among competing applicants for new broadcast facilities under the standard comparative criteria. Policy Statement on Comparative Broadcast

Hearings, 1 FCC2d 393, 5 RR2d 1901, 1909 (1965) ("In assessing [integration of ownership with management] proposals, we will ... look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management.") High Sierra Broadcasting, Inc., 96 FCC2d 423, 55 RR2d 627 (1983) (No integration credit for principal whose role would be limited to equipment maintenance and technical matters.) Apogee, Inc., 99 FCC2d 979, 57 RR2d 1585 (1985) (No integration credit for principal whose role as office manager involved only clerical and ministerial tasks.) Makai Broadcasting, Inc., 102 FCC2d 288, 58 RR2d 1488 (1985) (No integration credit for principal who proposed to serve as bookkeeper, office manager and traffic manager).

39. In the absence of contrary "evidence, particularly empirical evidence" (NPRM, Par. 45), the inclusion of "low-level" employees within the ambit of the proposed regulations would not appear to narrowly tailor such regulations to advance the Commission's interest in diversity.

40. **Small Stations.** If the Commission adopts new EEO Program Requirements, S&B would urge that small stations be exempt from compliance therewith. In S&B's view, stations with a staff of fifteen or less fulltime employees simply are too small

an employment universe in which to implement a meaningful EEO program. These employment units have fewer hiring opportunities and limited personnel and time resources available to implement the kind of comprehensive recruiting program contemplated by the Commission.

41. One concern which the Commission has expressed is that exempting small stations would reduce the amount of information it currently collects to monitor employment trends in the broadcast industry and thus would give it an incomplete picture of those trends (NPRM, Par. 85). The solution would be to continue to require stations with five or more fulltime employees to complete Section V (Employee Data) of the Annual Employment Reports, but exempt stations with fifteen or fewer fulltime employees from compliance with the rigorous EEO Program Requirements proposed by the Commission.

42. **Percentage of Minorities in Labor force.** Broadcast stations were exempt from submitting at renewal time Broadcast Equal Employment Opportunity Program Reports (FCC Form 396) for minority group members, if minority group representation in the available labor force was less than five percent in the aggregate. Five percent is, of course, a relative term: that is, five percent (50,000) of a labor force of one million is plainly a significant percentage; however, ten percent (5,000) of a labor

force of 50,000 is in S&B's view not a significant percentage. The Commission should exempt from its proposed EEO Program Requirements stations in markets with an aggregate labor force of 50,000 or less and an aggregate minority group representation in the labor force of ten percent or less.

43. **Closely Held Licensee Entities.** A majority of radio and television stations are owned and operated by individuals in their own right or by business associations, e.g., general partnerships, limited partnership, limited liability companies, closely held corporations, non-profit corporations, etc., whose interests are not publicly traded. In S&B's view, it is unreasonable for the Commission to insist that fulltime positions to be filled by owners be subject to its proposed EEO Program Requirements. Surely, a closely held broadcast licensee should be afforded the discretion to employ its owners (or in the case of non-profit corporations, its officers and directors) without requiring them to compete for the position with non-owners.

IV. S&B's Alternative EEO Proposal

44. As demonstrated above, the Commission undoubtedly would face a high hurdle in defending its revised EEO Program Requirements upon judicial review. Section 334 of the Act in all likelihood proscribes any revision to the Commission's EEO regulations. If nonetheless the regulations were to somehow pass

statutory muster, in all likelihood they would not pass constitutional muster.

45. In these circumstances, S&B would most respectfully urge the Commission to consider a constructive alternative to accomplish its objective of fostering diversity of viewpoints in programming. Specifically, S&B would urge the Commission to consider the adoption of an EEO Policy Statement setting forth its views concerning how broadcast stations ought to ensure equal employment opportunities to all qualified persons.

46. The statement would enunciate guidelines for the establishment of an EEO Program and EEO Program Requirements modeled after Section 73.2080(a)-(c) of the Rules, excluding Section 73.2080(c)(3). The suggested guidelines would be admonitory not mandatory and because the statement would not have the force of a regulation, the Commission would not impose monetary fines for perceived non-compliance. Colonial Cablevision of Revere, Inc., supra.

47. The Commission would also embark upon a comprehensive outreach program to assist broadcasters in implementing the EEO policy described in the Policy Statement. In particular, the Commission would provide the following assistance to broadcasters, their employees and prospective job applicants:

●**National Job Bank.** The Commission would establish a national job bank on its internet web site. Broadcast stations would list job availabilities by region, by states within the region, by station class (radio or television, commercial or noncommercial) and by job category and qualification requirements (if any). The web site would include a general description of the job opportunities, and ascribe a numerical designation to each, e.g., General Manager (1), Station Manager (2), Program Director (3), Professional (4) and Sales (5). Stations would list their call sign, location, class, numerical job designation, qualification requirements, date of posting, date of availability, and contact address and E-Mail address.

●**Outreach.** The Commission's EEO staff would make their services available to national industry (NAB) and women (NOW) and minority (NAACP, Rainbow Coalition) organizations, state and metropolitan area broadcast associations and state and local women and minority groups to assist them in establishing job banks, job fairs and other recruitment activities.

●**Training.** The EEO staff would also work with state and metropolitan area broadcast associations, group owners and individual broadcasters to develop on-the-job training opportunities to upgrade broadcast employee skills.

●**Student Assistance.** The EEO staff would also work with school systems, colleges and broadcasters to develop student internship programs and scholarships to schools offering programs relevant to broadcasting.

48. S&B believes that the institution of such a proactive program would have every prospect for achieving the Commission's laudable goal of promoting program diversity. Indeed, in S&B's view, such a program is likely to be more successful than a mandatory program which depends on continual regulatory oversight and the imposition of punitive sanctions.

49. Lastly, S&B would urge the Commission to cede to the Equal Employment Opportunity Commission primary jurisdiction to process cases alleging employment discrimination by broadcasters. See FCC and EEOC Memorandum of Understanding, 70 FCC2d 2320 (1978). Broadcast licensees would continue to advise the Commission of any complaint filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of a station. In cases of final determination, the Commission would retain authority to take appropriate action, e.g., license revocation, renewal denial or short term renewal.

V. Conclusion

50. S&B commends the Commission and its EEO staff for the laudable efforts it has undertaken to propose a comprehensive EEO regulatory program. Regrettably, in S&B's view, it is probable that the proposed program will not pass statutory or constitutional muster. S&B would, therefore, urge the Commission

to adopt an EEO Policy Statement and to develop a comprehensive outreach program to assist broadcasters in achieving the Commission's EEO objectives.

Respectfully submitted,

SMITHWICK & BELENDIUK, P.C.

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March 1, 1999

Certificate of Service

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C. do hereby certify that a copy of the foregoing "Comments of Smithwick & Belendiuk, P.C." was mailed by First Class U.S. Mail, postage prepaid, this 1st day of March, 1999 to the following:

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